No. 02-30326

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ALFRED ARNOLD AMELINE,

Defendant-Appellant

On Appeal from the United States District Court
for the District of Montana

OPPOSITION TO APPELLEE UNITED STATES' PETITION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) U.S.C.A. No. 02-30326
Plaintiff-Appellee,	) U.S.D.C. No. CR-02-00011-SEH) District of Montana, Great Falls
v.	)
ALFREDO ARNOLD AMELINE,	)
Defendant-Appellant.	)

I.

INTRODUCTION

Following United States v. Booker, 125 S. Ct. 738 (2005), Ameline correctly held that (1) Ameline's sentence violated the Sixth Amendment, (2) the error was plain, (3) it affected his substantial rights, and (4) the panel would exercise its discretion to correct the constitutionally defective sentencing. United States v. Ameline, 2005 WL 350811, *5-6 (9th Cir. Feb. 10, 2005). Accord United States v. Milan, 2005 WL 309934 (6th Cir. Feb. 10, 2005); United States v. Hughes, 396 F.3d 374 (4th Cir. 2005). The Sixth Amendment violations were serious: the Guideline range increased from a 16 month maximum to a 135 to 168 month range. See id. at *2, 4.

The petition challenges Ameline's analysis of the third and fourth plain error factors. See United States v. Olano, 507 U.S. 725, 732 (1993). The government denies that the errors affected Ameline's substantial rights and that they "seriously affected the

fairness, integrity, or reputation of judicial proceedings." [Pet. 2-3].

The petition turns on the government's attempt to recast the violations of Ameline's Sixth Amendment rights as an error of statutory construction: the district court didn't foresee Booker's reinterpretation of the Sentencing Reform Act ("SRA"). [Pet. 11-12]. United States v. Rodriguez, 2005 WL 272952 (11th Cir. Feb. 4, 2005), and United States v. Antonakopoulos, 2005 WL 407365 (1st Cir. Feb. 22, 2005), support the government's position. When the error is viewed not as a constitutional violation, but rather a misapprehension of the Guidelines' newly minted advisory status, the government (erroneously) concludes that Ameline cannot demonstrate a reasonable probability that the sentence would have been lower had the district court anticipated Booker. [Pet. 13]. The government argues that Guideline sentences are pretty reasonable, and Ameline's failure to undertake a reasonableness analysis as to the sentence imposed was error under the fourth Olano factor. [Pet. 9, 15-18].

The premise underlying the government's arguments -- that the error *is not* the violation of Ameline's Sixth Amendment rights by judicial factfinding - is based upon a fundamental misapprehension of Booker, a misapprehension shared by Rodriguez and Antonakopoulos. Booker *affirmed* the Seventh Circuit's conclusion "that Booker's sentence violated the Sixth Amendment,"

and remanded for resentencing. 125 S. Ct. at 769. Neither Rodriguez nor Antonakopoulos address that result.

Because Ameline faithfully applies Booker, the petition should be denied.

II.

THE SIXTH AMENDMENT VIOLATIONS AFFECTED AMELINE'S SUBSTANTIAL RIGHTS AND JUSTIFY RELIEF.

A. The Supreme Court Agreed that Booker's Sentence Violated the Sixth Amendment.

Booker contains two primary holdings: Apprendi v. New Jersey, 530 U.S. 466 (2000), applies to the SRA, and the SRA's constitutional defects can be cured by severing two provisions, 18 U.S.C. § 3553(b)(1), making the Guidelines mandatory, and 18 U.S.C. § 3742(e), establishing standards of appellate review. Booker "reaffirm[ed the Court's] holding in Apprendi: Any fact ... which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." 125 S. Ct. at 756. The remedial majority reinterpreted the SRA, creating advisory Guidelines and holding that sentencing is governed by 18 U.S.C. § 3553(a). Id. at 757.

Booker applied its holdings to the defendants, Booker and Fanfan. As to Booker, the Court observed that "the District Court applied the Guidelines as written and imposed a sentence higher than the maximum authorized solely by the jury's verdict," Booker, 125 S. Ct. at 769, and endorsed the Seventh Circuit's "conclu[sion]

that Booker has a right to have the jury determine the quantity of drugs he possessed and the facts underlying the determination that he obstructed justice." United States v. Booker, 375 F.3d 508, 514 (7th Cir. 2004).

> The Court of Appeals held Blakely[v. Washington, 124 S. Ct. 2531 (2004)] applicable to the Guidelines, concluded that Booker's sentence violated the Sixth Amendment, vacated the judgment of the District Court, and remanded for resentencing. We affirm the judgment of the Court of Appeals and remand the case.

125 S. Ct. at 769. Thus, Booker's sentence violated the Sixth Amendment. United States v. Oliver, 2005 WL 233779, *7 (6th Cir. Feb. 2, 2005).

Fanfan's "sentence ... was authorized by the jury's verdict," and "did not violate the Sixth Amendment." 125 S. Ct. at 769. Booker nonetheless remanded for the parties to seek resentencing. Id.

The dispositions of Booker's and Fanfan's cases demonstrate that "*both* the Sixth Amendment holding and [the] remedial interpretation of the Sentencing Act" apply to cases on direct review. See id. (emphasis added). Accord Hughes, 396 F.3d at 379. Booker's reference to *both* dispositions supports the view that Booker's case involved a constitutional violation, while Fanfan's implicated the "remedial interpretation." See Hughes, 396 F.3d at 379 ("The Booker Court concluded that this remedial scheme should apply not only to those defendants, like Booker, whose sentences were imposed in violation of the Sixth Amendment, but also to those

defendants, like Fanfan, who had been sentenced under the mandatory regime without suffering the constitutional violation."). Accord United States v. Crosby, 2005 WL 240916, *8 (2d Cir. Feb. 2, 2005).

Booker noted that not "every sentence gives rise to a Sixth Amendment violation." 125 S. Ct. at 769. The converse must also be true, as Booker's case demonstrates: some cases involve such violations. Those cases that involve Sixth Amendment violations are differently situated than others; "*in cases not involving a Sixth Amendment violation*, whether resentencing is warranted or whether it will be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine." Id. This passage suggests not only that some cases will involve Sixth Amendment violations, but also that such constitutional violations are not subject to review for reasonableness. Booker thus identifies two types of error: constitutional violations and "remedial interpretation" issues.

B. The Constitutional Errors in *Ameline* Affect Substantial Rights.

The panel correctly applied Booker. It observed that "[t]he manner in which the district court arrived at Booker's sentence highlighted the constitutional deficiencies in the Sentencing Guidelines," and that "Booker's sentence -- 360 months -- was not authorized by the jury's verdict and was therefore improper under the Sixth Amendment." 2005 WL 350811 at *4. Like Booker's, Ameline's offense level was greatly enhanced by facts found by the

district court. See id. Consequently, "as in Booker, Ameline's sentence violated his Sixth Amendment rights as construed by Apprendi and Blakely." Id.

Those violations demonstrate that Ameline's substantial rights were affected:

> Without additional factual findings by the court, Ameline faced a maximum sentence of sixteen months. Instead, he received a sentence of 150 months. Under these circumstances, we have no doubt that the constitutional error affected Ameline's substantial rights.

Id. at *5. Because the error was analyzed as Booker defined it -- as a Sixth Amendment violation -- there is "no doubt" that substantial rights were affected.

The Fourth and Sixth Circuits agree. In Hughes, the offense level was enhanced by the district court's factual findings as to, *inter alia*, loss. See 396 F.3d at 380. Hughes found a Sixth Amendment violation: "Hughes' sentence exceeded the maximum sentence then authorized by the facts found by the jury alone, in violation of Booker." Id. at 379 (emphasis added). Having defined the error as a Sixth Amendment violation, Hughes found that the substantial difference between the offense level as calculated by use of the jury's factual findings and that calculated by the district court demonstrated "that the error affected Hughes' substantial rights." Id. at 380 (citation omitted).[1] Accord

[1] Hughes rejected the inquiry advocated by the government: "The question for purposes of determining whether Hughes was prejudiced is not what the district court would have done had it imposed a sentence in the exercise of its discretion pursuant to § 3553(a)." 396 F.3d at 380 n.6. The defendant did not raise the

United States v. Washington, 2005 WL 326986, *5 (4th Cir. Feb. 11, 2005).

The Sixth Circuit follows the panel's approach. In Milan, Sharn Milan claimed a Sixth Amendment violation because his sentence was based on drug quantity and other facts that were not admitted in his guilty plea. See 2005 WL 309934 at *3-4. Following Booker, Milan agreed. See id. at *4. Accord United States v. McDaniel, 2005 WL 366899, *5-6 (6th Cir. Feb. 17, 2005); United States v. Hines, 2005 WL 280503, *6-8 (6th Cir. Feb. 7, 2005); United States v. Davis, 2005 WL 130154, *9 (6th Cir. Jan. 21, 2005); Oliver, 2005 WL 233779 at *7.

Observing that a finding that the error affects substantial rights requires that the error "'must have affected the outcome of the district court proceedings,'" id. (quoting Olano, 507 U.S. at 734), Milan concluded that "[i]n Sharn's case the error *determined* the outcome of the district court proceedings in the sense that the sentence Sharn received -- imposed under mandatory guidelines -- depended on the consideration of facts he did not admit and which were not proved to a jury." Id. (emphasis in original). Accord Davis, 2005 WL 130154 at *9. Rather than "hypothesize alternative sentences the district court might have imposed had it anticipated

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discretion issue, but rather urged the constitutional claim advanced by Booker. See id. It was therefore unnecessary to address the implications of the district court's new discretionary authority, just as Booker relied solely on Booker's Sixth Amendment argument in affirming Booker's remand for resentencing. See 125 S. Ct. at 769.

Booker," Milan confirmed that the Sixth Amendment violations affected the outcome of the district court proceedings as required by Olano: "It is clear that had the district court not found facts on its own at sentencing, which under Booker constitutes a violation of the Sixth Amendment, Sharn's sentence would have been materially different." Id. Accord McDaniel, 2005 WL 366899 at *6 (defendants' "substantial rights were affected by the district court's plain Sixth Amendment errors in sentencing" where sentences exceeded "the maximum Guideline sentence supported by the jury's fact-finding"); Oliver, 2005 WL 233779 at *8.[2] Several well-reasoned cases employ Ameline's approach, finding Sixth Amendment violations that affect substantial rights in cases where the sentence exceeded the Guideline range authorized by the jury's verdict or the plea.

C. The Government Ignores *Booker*'s Finding of a Sixth Amendment Violation As To Booker and *Booker*'s Recognition that Pending Cases Will Present Both Constitutional and Reinterpretation Issues.

The premise underlying the argument that the constitutional errors did not affect Ameline's substantial rights is that "[t]he error in a Guidelines sentence imposed prior to Booker is not, as the [Ameline] panel believed ..., the use of judicially-found facts to impose an enhanced sentence; rather, the error is the use of

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[2] The government relies on United States v. Bruce, 2005 WL 241254 (6th Cir. Feb. 3, 2005). [Pet. 17]. Bruce is not considered binding within and has not been followed by the Sixth Circuit. See Milan, 2005 WL 309934 at *6 n.3.

such enhancements in connection with a *mandatory* Guidelines regime." [Pet. 12-14 (emphasis in original)]. The premise finds support in Rodriguez and Antonakopolous, but not in Booker.

Rodriguez argued that his sentence violated Blakely because the district court "determin[ed] his offense level based on facts that were neither charged in his indictment nor proven to a jury." Rodriguez, 2005 WL 272952 at *1. Rodriguez found plain "Booker error" because "Rodriguez's sentence was enhanced as a result of findings made by the judge that went beyond the facts admitted by the defendant or found by the jury." Id. at *7. To this point, Rodriguez's analysis tracks the panel's.

Rodriguez parts company with the panel -- and Booker -- when it analyzes Rodriguez's substantial rights. It redefines the error it had identified only a page earlier:

> The error that was committed in pre-Booker sentencing, like that which occurred in this case, is not that there were extra-verdict enhancements -- enhancements based on facts found by the judge that were not admitted by the defendant or established by the jury verdict -- that led to an increase in the defendant's sentence. The error is that there were extra-verdict enhancements used in a mandatory guidelines system.

Id. at *8. Accord Antonakopoulos, 2005 WL 407365 at *4. Rodriguez's use of the singular term "error"[3] fundamentally conflicts with the Booker remedial majority's identification of at least two types of error: Sixth Amendment violations and "remedial interpretation" errors. Booker, 125 S. Ct. at 769. Booker

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[3] The government makes the same mistake. [Pet. 12].

suffered constitutional error; Fanfan did not. See Hughes, 396 F.3d at 379.

Rodriquez's theory that there is but a single Booker error cannot be reconciled with Booker itself. Booker affirmed the Seventh Circuit's conclusion that Booker's Sixth Amendment rights were violated. See Booker, 125 S. Ct. at 769. And its admonition that not "every sentence gives rise to a Sixth Amendment violation," id., presupposes that some sentences will. Yet Rodriquez seeks to define *all* errors in terms of the district court's failure to anticipate the advisory Guidelines.

That cannot be squared with Booker's admonition that constitutional and non-constitutional errors would be subject to differing analyses: "*in cases not involving a Sixth Amendment violation*, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine." Booker, 125 S. Ct. at 769 (emphasis added). If Rodriquez and Antonakopoulos were right, that sentence would not be limited to "*cases not involving a Sixth Amendment violation;*" it would read "*in all cases.*" Rodriquez, Antonakopoulos, and the Government posit a one-size-fits-all harmless error analysis; Booker does not: it contemplates a different analysis for constitutional error. Ameline vindicates that distinction by analyzing the Sixth Amendment violation: the failure to submit to a jury the facts that

determined the maximum Guideline sentence. See 2005 WL 350811 at *4.

Rodriguez's conclusion that Rodriguez couldn't demonstrate an effect on his substantial rights turns on its mischaracterization of the error. Because it characterized the error in terms of the district court's hypothetical exercise of its discretion, Rodriguez held that the defendant could not meet his burden to show prejudice because noone knows how the district court would have exercised its discretion. See 2005 WL 272952 at *10 (citing Jones v. United States, 527 U.S. 373 (1999)).[4] But once the error is properly viewed as a Sixth Amendment violation, it plainly "affected the outcome of the district court proceedings," Olano, 507 U.S. at 734, because it was the Sixth Amendment violation that permitted the

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[4] The government endorses speculation, noting that Booker held "that once the statutes that made the Guidelines mandatory were excised, the 'system remaining after excision' is constitutional." [Pet. 12 (quoting Booker, 125 S. Ct. at 764-68))]. Fair enough, but that is not the system under which Ameline was sentenced. The government asks this Court to analyze how the district court would have exercised discretion it did not have when it imposed sentence. While all harmless error analysis involves speculation, the government invites this Court to imagine a sentencing hearing far different from what took place. Harmless error analysis should focus on how an error affected *the proceeding that actually occurred* rather than positing an entirely different proceeding and then taking a guess at how it would have come out. To paraphrase Sullivan v. Louisiana, 508 U.S. 275, 279 (1993), "[t]he inquiry ... is not whether, in a [sentencing hearing] that occurred without the error, [the same sentence] would surely have been [imposed], but whether the [sentence] actually [imposed] in *this* [sentencing hearing] was surely unattributable to the error." When the focus is on the sentencing hearing that actually occurred, the sentence is obviously attributable to the district court's usurpation of the jury's function.

district court to increase the sentence above that authorized by the jury's verdict or the guilty plea. See Ameline, 2005 WL 350811 at *5.

Not only is Rodriguez inconsistent with the remedial opinion's view that not all errors are to be treated identically, the Sixth Circuit has persuasively explained why Rodriguez cannot be reconciled with Booker's remand. See Milan, 2005 WL 309934 at *6-7. "At the very least, a remand for resentencing of Booker must rest on a decision that the error in his case was reversible, i.e., was not harmless and affected Booker's substantial rights." Id. at *7 (citation omitted). The Court's disposition of Booker's case is "a holding that sentencing Booker in a manner that violated the Sixth Amendment affected his substantial rights. It is hard to see how the Eleventh Circuit's decision in Rodriguez is consistent with this result." Id.

The analysis in Rodriguez, which informs not only the government's analysis but also that of Antonakopoulos, does not explain the result in Booker's case and cannot be reconciled with the remedial majority's discussion of the resolution of post-Booker claims. It does not merit rehearing.[5]

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[5] The government does not urge this Court to adopt the analysis in Crosby, 2005 WL 240916. Crosby shares Rodriguez's flaws: it treats Sixth Amendment violations and "remedial interpretation" errors alike. See Milan, 2005 WL 309934 at *7 (criticizing Crosby's Booker analysis). Crosby creates a novel procedure in which cases are remanded for the district court to determine -- with limited input -- whether a resentencing would result in a nontrivial difference in the sentence previously imposed. See Crosby, 2005 WL 240916 at *11. But see Milan, 2005

D. **Even Under *Rodriguez*'s Approach, Ameline's Substantial Rights Were Affected.**

Even if the third Olano factor involves considering only the mandatory application of the Guidelines, Ameline's substantial rights were affected because there is a sufficient probability of a lower sentence and, in any event, prejudice should be presumed. Rodriguez's argument based on Jones takes dicta in that case far beyond its intended scope. Jones considered a defendant's claim that jurors may have been "confused over the consequences of juror deadlock." Jones, 527 U.S. at 394. Not only did the Court reject the defendant's confusion claim, see id., thus making the discussion relied on by Rodriguez dicta, it also noted that the proposed instruction "would have had such an indeterminate effect on the outcome of the proceeding that we cannot conclude that any alleged error in the District Court's instructions affected petitioner's substantial rights." Id. at 395.

Jones is inapposite. Post-Jones Supreme Court authority clarifies that a defendant need not "prove by a preponderance of the evidence that but for the error, things would have been different." United States v. Dominguez-Benitez, 124 S. Ct. 2333, 2340 n.9 (2004). While Jones was skeptical of the effect that the proposed instructions might have, noone could dispute that Booker's

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WL 309934 at *7 (criticizing Crosby's "ingenious [remedial] approach"). Crosby does not merit reconsideration of the panel's decision.

transformation of the Guidelines from mandatory to advisory had a tremendous effect on the scope of a sentencing court's discretion.

The generic comments relied upon by the government do not suggest that the district court would not exercise its discretion in Ameline's favor. [Pet. 13]. Drug crimes of all types are typically described as "very serious" and "extremely detrimental" by sentencing judges. And the district court's assessment of the scope of the offense may well have been informed by non-discretionary relevant conduct rules, see USSG § 1B1.3, *requiring* it to punish Ameline based on conduct proved by only a preponderance of the evidence. On remand, Booker would provide the discretion to disregard conduct proved by such flimsy evidence (which included extensive hearsay), [ST 108], and to sentence within a far wider range. See United States v. Knight, 266 F.3d 203, 207 (3d Cir. 2001) (presuming prejudice when wrong Guideline range considered). "'[T]he probability of a different result is 'sufficient to undermine confidence in the outcome,'" Dominguez-Benitez, 124 S. Ct. at 2340, for a 62 year old man who "lack[s] ... any appreciable criminal history." [ST 110].

The panel's substantial rights conclusion is also supported by the presumption of prejudice in United States v. Barnett, 2005 WL 357015 (6th Cir. Feb. 16, 2005). Barnett involved non-constitutional error: the district court did not foresee Booker. Id. at *8. Noting that Olano acknowledged that some errors will require a presumption of prejudice, id. at *9, and that several

Circuits have applied the presumption to certain errors, see, e.g., United States v. Reyna, 358 F.3d 344 (5th Cir. 2004), the Sixth Circuit analyzed whether Booker's extreme makeover of federal sentencing warranted application of the presumption. It did, for two reasons: (1) the district court's new discretion permitted a lower sentence, 2005 WL 357015 at *10, and (2) Booker's "fundamental alteration of the sentencing process" made it "exceedingly difficult for a defendant ... to show that his sentence would have been different." Id.

Barnett also specifically rejected one of the factors emphasized by the government here, Ameline's mid-range sentence.[6]

> This fundamental difference between the pre- and post-Booker sentencing frameworks illustrates our deep concern with speculating, based merely on a middle-of the-range sentence imposed under the mandatory Guidelines framework, that the district court would not have sentenced Barnett to a lower sentence under the advisory Guidelines regime.

Id. at *11. Barnett's analysis is even more apt here as Ameline suffered Sixth Amendment violations at his sentencing.

E. The Panel Properly Exercised Its Discretion.

Emphasizing that the "sentence ... violated Ameline's Sixth Amendment rights," Ameline held that "'to leave standing this sentence imposed under the mandatory guideline regime, we have no doubt, is to place in jeopardy the fairness, integrity or public

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[6] The new mid-range, the middle of the statutory range, is lower than the Guideline mid-range, and is another basis to believe a lower sentence is reasonably probable.

reputation of judicial proceedings.'" Ameline, 2005 WL 350811 at *6 (quoting Hughes, 396 F.3d at 381). Accord Milan, 2005 WL 309934 at *6; Davis, 2005 WL 130154 at *9; Oliver, 2005 WL 233779 at *8. This Court has already held that "[i]t is easy to see why prejudicial sentencing errors undermine the fairness, integrity or public reputation of judicial proceedings': such errors impose a longer sentence than *might* have been imposed had the court not plainly erred." United States v. Castillo-Casiano, 198 F.3d 787, 792, amended, 204 F.3d 1257 (9th Cir. 2000) (emphasis added). And the countervailing efficiency interest -- avoiding a new sentencing hearing -- is far less compelling here where there will be no new trial. See id. Accord United States v. Williams, 2005 WL 425212, *5 (2d Cir. Feb. 23, 2005). Castillo-Casiano remanded solely for discretionary consideration of a newly available ground for downward departure, a mere fraction of the discretion available now under Booker.

The government argues that Ameline and the Fourth and Sixth Circuits are wrong, claiming that they "fail[] to appreciate that [the] defendant was sentenced under a system that was used for almost two decades to sentence thousands of offenders." [Pet. 15]. Ameline, like the Fourth and Sixth Circuits, explicitly based its conclusion on the fact that the sentence was based on violations of the Sixth Amendment. See, e.g., Ameline, 2005 WL 350811 at *6. The government's attempt to elevate a (nearly) two decade

experiment over fundamental constitutional values of over two centuries' duration is misguided.

It is no small deprivation that Ameline suffered: he was denied the right to a grand jury indictment, proof beyond a reasonable doubt, and a jury of his peers. A system of justice that elevates efficiency over these interests would certainly diminish the reputation of judicial proceedings; it would bespeak a system that had lost its way, that could no longer appreciate the ascendancy of the timeless values embodied in the Constitution. The government's broad endorsement of Guideline sentencing is unpersuasive after Blakely's recognition that such a regime relies "'not on facts proved to [a defendant's] peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.'" Id. (quoting Blakely, 124 S. Ct. at 2542).

The government criticizes the panel for not evaluating the reasonableness of Ameline's sentence and its reluctance to assume the trial court's traditional sentencing role. But Booker performed no reasonableness analysis before remanding Booker and Fanfan, and it intimated that no such analysis should be employed when there is a Sixth Amendment violation. See 125 S. Ct. at 769. Here, there was a Sixth Amendment violation. See Ameline, 2005 WL 350811 at *4.

Nor are the government's citations to authorities approving of harmless error review of single discrete issues, [Pet. 17-18], the

least bit relevant here: a so-called harmless error review here would involve guessing as to how the district court would have exercised its discretion with respect to each guideline calculation. The naked exercise of sentencing discretion posited by the government is "'tantamount to performing the sentencing function ourselves.'" Ameline, 2005 WL 350811 at *6 (quoting Hughes, 396 F.3d at 381). "We would be usurping the discretionary power granted to district courts by Booker if we were to assume that the district court would have given [the defendant] the same sentence post-Booker." Oliver, 2005 WL 233779 at *8 n.3 (internal quotation marks and citation omitted). See also Williams v. United States, 503 U.S. 193, 205 (1993) (sentencing is a trial, not appellate, court function).

III.

CONCLUSION

The petition should be denied.

Respectfully submitted,

Dated: February 25, 2005

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FORM 11.

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is:

____ Proportionately spaced, has a typeface of 14 points or more and contains _____words (petitions and answers must not exceed 4,200 words).

or

x___ Monospaced, has 10.5 fewer characters per inch and contains 4,200 words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

Feb. 25, 2005
Date

Signature of Attorney or
Unrepresented Litigant

(Eff. 7/1/2000)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) U.S.C.A. No. 02-30326
	) U.S.D.C. No. CR-02-00011-SEH
Plaintiff-Appellee,	) District of Montana, Great Falls
	)
v.	)
	)
ALFREDO ARNOLD AMELINE,	) PROOF OF SERVICE
	)
Defendant-Appellant.	)
	)

I, the undersigned, say:

1. That I am over eighteen (18) years of age, a resident of the County of San Diego, State of California, not a party in the within action, and that my business address is U.S. Courthouse, 450 Golden Gate Ave., San Francisco, California, 94102; and

2. That I mailed the within OPPOSITION TO APPELLEE UNITED STATES' PETITION FOR REHEARING EN BANC by hand delivery, an original and fifty (50) copies thereof to the United States Court of Appeals for the Ninth Circuit, 95 7th Street, San Francisco, CA 94103;

3. That I served the within Petition for Rehearing for Defendant-Appellant to counsel for Plaintiff-Appellee by mailing a copy to:

Michael A. Rotker, Attorney
United States Department of Justice
Criminal Division, Appellate Section
950 Pennsylvania Ave., N.W. Suite 1264
Washington, DC 20530

4. That I served a copy to defendant-appellant by mailing a copy to:

Alfred Arnold Ameline
Reg. No. 07284-046
Florence Camp
P.O. Box 5000
Florence, CO 81226

I certify that the foregoing is true and correct. Executed on February 25, 2005, at San Diego, California.

Dawn Anderson

DAWN ANDERSON